PUBLIC COPY
identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Nebraska Service Center Date: MAR 12 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.[1]

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing to the present.

On appeal, counsel argues that the petitioner has demonstrated the financial ability to pay the beneficiary since the time the priority date was established.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered as of the petitioner's priority date, which is the date the request for labor certification was

---

[1] This decision is addressed to the petitioner as its name appears on the petition. It is noted that three different names for the petitioner appear throughout the record with no explanation or evidence to explain or resolve the discrepancies.

accepted for processing by any office within the employment system of the Department of Labor. The petitioner's priority date in this instance is April 27, 2001. The beneficiary's salary as stated on the labor certification is $15.00 per hour or $31,200 per year.

With the petition, counsel submitted copies of cancelled bank checks made payable to the beneficiary in the amount of $1,014.44 each (10 for 2001 totaling $10,144.40, and one $1,014.44 check for 2002) and copies of bank statements for October 2001 through June 2002.

In a request for evidence (RFE) dated November 4, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. In response, counsel submitted copies of petitioner's bank statements for May 2001 through December 2002, copies of bank checks made payable to the beneficiary in the amount of $1,014.44 each in September, October, and November 2002, and a copy of beneficiary's 2001 Form W-2, Wage and Tax Statement, issued by the petitioner.

Counsel also included a copy of a 1994 AAU decision that sustained an appeal based on the petitioner's evidence of bank statements showing monthly balances in excess of $41,000 per month, where the proffered wage was $34,500 per year. The decision concluded that since the petitioner presented evidence that it had paid the beneficiary $25,960, the monthly bank balances showed the petitioner could have paid the remaining amount of the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits a brief and additional evidence in the form of the beneficiary's 2002 Form W-2. Counsel states that the petitioner's argument relies on the previous AAU decision. Counsel states that the evidence shows that the beneficiary was paid $15,360 in 2001, and that the petitioner's average monthly bank balance was $3,513 from May 2001 through December 2001, sufficient to meet the difference in the monthly wage paid to the beneficiary. Counsel also states that the evidence shows the beneficiary was paid $15,360 in 2002, and that the petitioner's average bank balance was $3,014, again sufficient to pay the difference between the wage received and the proffered wage.

Counsel's arguments are not persuasive. Counsel does not provide a published citation in which AAO accepted the use of average

[redacted]

monthly balances to determine a petitioner's ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all CIS employees in the administration of the Immigration and Nationality Act (the Act), unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner has not provided primary evidence of its ability to pay the proffered wage, namely annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2). CIS may rely on the primary evidence. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp 1049 (S.D.N.Y. 1986); *KCP Food Co., Inc. v Sava*, 623 F. Supp 1080 (S.D.N.Y. 1985). Bank statements, without more, are unreliable indicators of ability to pay, as they do not identify funds that are already obligated for other purposes. Moreover, the petitioner's bank statements are even more unreliable as they show months with negative balances and others with a clear indication of inability to make up the difference in wages.

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage beginning on the priority date and continuing to the present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.